K-Mart Corporation *and* Retail Store Employees Union Local 1001, chartered by United Food and Commercial Workers International Union, AFL-CIO *and* Barbara Bundy *and* Cynthia Leingang. Cases 19-CA-10970, 19-CA-11077, 19-CA-11090, and 19-CA-11464

April 14, 1981

DECISION AND ORDER

On May 9, 1980, Administrative Law Judge David G. Heilbrun issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in answer to the General Counsel's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that Respondent, K-Mart Corporation, violated Section 8(a)(1) of the Act by unlawfully engaging in, and/or creating the impression of, surveillance of its employees, soliciting, promising to remedy, and remedying their grievances, threatening them with loss of benefits, restricting access to phones and bulletin boards, and prohibiting an employee from having any further access to the personnel files because she engaged in union activities. The complaint further alleges that Respondent violated Section 8(a)(3) and (1) of the Act by altering the job duties of, issuing reprimands to, and constructively discharging employee Cynthia Leingang because of her union activities and by discharging employee Barbara Bundy for engaging in similar activities. The Administrative Law Judge found that Respondent had not engaged in any unlawful conduct and recommended that the complaint be dismissed in its entirety. While we agree with the Administrative Law Judge that Bundy's discharge did not violate Section 8(a)(3) and (1) of the Act and that Leingang's job duties were not altered, we disagree with his other findings.

Briefly, the facts herein reveal that Respondent, which is engaged in the retail sale of merchandise in a number of stores throughout the United States, opened a new store in Kent, Washington, in October 1977. In early December 1978, employee Janet Lamphere contacted Steve Gouras, the local representative of the Charging Party Union, apparently to discuss the possibility of organizing the employees at the Kent store. After signing an authorization card, Lamphere arranged to have Gouras meet with other employees on December 5, 1978, at Meeker's Landing Restaurant, located in Kent. On December 5, Gouras met with several employees, including Lamphere, Cynthia Leingang, Cheryl Hannan, and Joy Stevens, at which time authorization cards were signed by all of the employees present. At the hearing, Respondent's store manager, Kenneth Bolding, admitted having had prior knowledge of the December 5 union meeting. He further admitted having seen Lamphere distributing authorization cards.

Shortly after the December 5 meeting, Respondent began engaging in certain conduct which the Administrative Law Judge, characterizing it as "a tactical reaction to incipient unionism," found did not rise to the level of unfair labor practices. We disagree.

I. THE 8(A)(1) CONDUCT

1. The first alleged incident of unlawful conduct occurred on December 8, 1978. On that day, according to Lamphere's uncontradicted testimony, Respondent's regional personnel supervisor, June Cozad, approached Lamphere and asked her what her complaints were. Lamphere replied that everyone at the store, including herself, had complaints. Cozad then invited Lamphere into the personnel office to discuss her complaints. Before going into the personnel office, Lamphere summoned Leingang, who in turn called Hannan, Stevens, and cafeteria employee Carol Abbott, after which all five employees entered the office and met with Respondent's personnel manager, Joyce Fournier, its merchandise district manager, George Brownsworth,[2] and Bolding. According to Lamphere, once inside the office Brownsworth asked the employees what their complaints were. Several problems were thereafter discussed, including the fact that employees were required to wait an extra 15 to 25 minutes after clocking out before leaving the store, thefts from employees' purses, additional help for the cafeteria, and a scheduled pay raise for Lamphere which she had not yet received. After listening to the employees' complaints and answering some of their questions, Brownsworth agreed to look into the matter. Shortly thereafter, Re-

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Brownsworth, whose duties as district manager consisted of checking the merchandise assortment at all of Respondent's stores in his district, including the Kent store, testified that the sole reason for his visit to the Kent store during the period from December 5 to December 9, 1978, was to check the store's Christmas merchandise and displays.

spondent remedied some of the problems discussed during the December 8 meeting by providing the employees with lockers for their purses and by providing an alternative method of egress from the store so that employees would not be delayed at closing time.

The Administrative Law Judge found that Respondent's conduct, as described above, was not unlawful, noting rather that the entire incident arose from a "casual inquiry" by Supervisor Cozad, and finding Brownsworth's remarks to be "permissibly inquisitive" of the employees' general views. Contrary to the Administrative Law Judge, we find that said conduct constituted an unlawful solicitation of grievances and an unlawful promise to remedy them. In so doing, we find significant the fact that, while refusing to find a violation, the Administrative Law Judge nevertheless found, and we agree, that Brownsworth's visit to the Kent store during the early stages of the Union's organizational campaign was more than a mere coincidence and that he (Brownsworth) and "other management personnel were keenly concerned with a surge of interest in the Union and . . . sought to counteract it by arguably overstepped means." Furthermore, while Respondent argues that employees, in the past, had discussed their grievances with management, there is no evidence to indicate that grievance sessions, such as the one initiated by management on December 8, involving groups of employees and high-level management officials had ever been held. Nor has Respondent offered any plausible explanation as to why it chose to discuss and indeed remedy the employees' grievances immediately after it learned of the Union's organizational efforts when, as it asserts, these problems existed before the Union began its organizing campaign. Under these circumstances, we conclude that the December 8 incident, rather than being a "casual inquiry" into the employees' general views, constituted an unlawful attempt by Respondent to solicit and remedy employee grievances, thereby interfering with, restraining, and coercing employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.[3] We also find, in these circumstances, that Cozad unlawfully interrogated Lamphere by asking her what her complaints were.

2. The complaint alleged that commencing on December 8, 1979, and continuing for several weeks thereafter, Respondent engaged in the unlawful surveillance of several of its employees' activities. Thus, Leingang testified, without contradiction, that on December 8, after the meeting described above, she, Hannan, Lamphere, and Stevens were in the store cafeteria discussing the Union when Brownsworth, Bolding, Fournier, and Cozad entered and sat a few tables away from them. The employees thereafter got up and headed for the employee lounge but they were followed by Cozad, who sat down with them. The employees then ceased discussing the Union.

The following day, Leingang and Hannan, who apparently had the day off, were in the store to do some shopping. According to Hannan's uncontroverted testimony, upon entering the store they saw Bolding and Cozad talking in one of the aisles. She further testified that, after splitting up with Leingang, she headed for the men's wear department, whereupon she noticed that Cozad had followed her and was standing in the aisle staring at her as she browsed through the merchandise. Hannan then engaged in a conversation with Department Manager Francis Wesner, and shortly thereafter Cozad appeared and inquired as to the nature of their conversation. After informing Cozad that they were discussing the Union, Hannan went into the stockroom and Cozad thereafter stopped following her. Leingang testified that, after she left Hannan, Bolding followed her throughout the store staying approximately 4 feet away from her. Leingang further testified that the following day, December 10, she was again followed throughout the store by Bolding while she was shopping with her husband.

Lamphere testified, also without contradiction, that several days after the December 8 meeting, while on her break period, she was talking to a former employee who was in the store shopping when Cozad appeared and asked the person if he was an employee, to which he responded in the negative. Lamphere then informed Cozad that she was on her break and that she could talk to whomever she wanted. The former employee, in response to Cozad's further inquiry, stated that he was a customer and declined Cozad's offer to assist him. Cozad then moved a short distance away and remained there observing Lamphere and the former employee until they finished their conversation.

Hannan also testified that on January 6, 1979, she was in the store shopping when she met Leingang and Lamphere, who also had come there to shop,

[3] The General Counsel has excepted, *inter alia*, to the Administrative Law Judge's refusal to find that Respondent also unlawfully solicited employees' grievances during a meeting held on January 30, 1979, between Respondent's representatives and several of its employees. The only evidence in support of this allegation is Leingang's rather vague testimony that during that meeting someone, whom she did not identify, "asked if we had any complaints or gripes or how everything was going in the office, cash cage, merchandise office." She further testified that there were a "few things" she could not remember about the meeting. Under these circumstances, we conclude that the evidence is too vague and insufficient to support an 8(a)(1) finding.

in the cafeteria having coffee. According to her undisputed testimony, when Leingang and Lamphere left the cafeteria, Bolding who was also in the cafeteria, got up and began to follow them. Shortly thereafter, Hannan got up and left but was soon followed by Merchandise Manager Ronald Freitas, an admitted supervisor. Hannan headed for the plant department where she again met with Leingang and Lamphere. Hannan further testified that, while Freitas stopped following her at this point, she nevertheless noticed Bolding standing nearby watching them. Shortly thereafter, Lamphere went off in another direction and Leingang and Hannan walked through various departments followed closely at all times by Bolding and Assistant Store Manager Alvin Perman, who had apparently joined Bolding in the interim. Later, the three employees met again in the cafeteria for lunch where they also encountered Bolding, Freitas, Perman, and Gerald Lane, another assistant store manager. After lunch, the three employees went to the domestics department and were, according to Hannan, watched by Frietas from the nearby sporting goods department. In order to determine whether they were being followed, Hannan, Leingang, and Lamphere decided to split up. Thereafter, Lane followed Leingang into the domestics department, while Perman and Bolding went to the furniture department which was adjacent to the shoe department where Hannan had gone. Finally, Hannan testified that later that evening she returned to the store with Leingang and their husbands and that during this time they were again followed by Bolding and Perman.

The Administrative Law Judge, while crediting the above testimony, refused to find that Respondent had engaged in any misconduct, notwithstanding his conclusion that the employees had "credibly perceived" that they were being "shadowed" by Respondent. In so finding, he concluded that their testimony was "diluted by a high degree of subjectivity necessarily present in what a person reports."

Contrary to the Administrative Law Judge, we find that Respondent engaged in the above-described conduct in order to keep its employees' union activites under surveillance or to convey to them the message that their activities were being watched. Thus, the credible evidence reveals that, shortly after it learned of the Union's organizational campaign, and on the same day that it unlawfully solicited employee grievances, as found above, Respondent's supervisory personnel began following certain off-duty employees, all of whom were union adherents, throughout the store and, on at least one occasion, uninvitedly joined said employees during their breaktime. Furthermore, Respondent had presented no evidence to show that it had engaged in similar conduct prior to the advent of the Union's organizational campaign nor has it offered any explanation as to why it was necessary for its supervisory personnel to engage in such conduct. Additionally, it is significant to note that only the activities of those employees whose prounion sympathies were either apparently known to, or suspected by, Respondent were kept under surveillance and that such surveillance, as noted above, occurred primarily during the employees' nonworking time, a time when Respondent clearly had little or no reason to keep them under observation.

Thus, the timing of these incidents to the commencement of the Union's organizational campaign, the fact that they occurred during the employees' nonworking time[4] and in the context of Respondent's unlawful solicitation of grievances, and Respondent's failure to offer any reason for "shadowing" its employees combine to lead us to find that Respondent's supervisory personnel engaged in such conduct solely in response to its employees' union activities and to inhibit them from engaging in such activities. Accordingly, we find that Respondent unlawfully engaged in, and created the impression of, surveillance of its employees' union activities in violation of Section 8(a)(1) of the Act.

3. It is alleged that Respondent unlawfully threatened employees with loss of benefits if they selected the Union as their collective-bargaining representative. The record in this regard reveals that on December 13, 1978, Donald Rogers, Respondent's regional manager for the ladies' wear department,[5] in the presence of the ladies' wear district manager, approached Hannan and asked her if she had any complaints he could help her with. Hannan replied that, as far as the ladies' wear department was concerned, she had no complaints. Rogers then invited Hannan into the personnel office for a private conversation where he would be able to answer any questions Hannan may have. Hannan agreed. Once inside, Rogers told Hannan that, if she had any questions, he would try to answer them. Hannan, however, did not ask any questions, so Rogers initiated the conversation by asking her why she thought a "third party was needed to take care of [employee] complaints." Hannan responded that, while the ladies' wear department did not need a "third party," the rest of the store did. During their conversation, Rogers told Hannan that "he couldn't think of anything good to say about the Union" and, further, recom-

[4] See *J. C. Penney Co., Inc.*, 209 NLRB 313 (1974).

[5] The Administrative Law Judge found Rogers to be an agent of Respondent.

mended that she visit Respondent's other stores "and ask about their contracts and how unhappy they were with them." He further stated that, if the Union came in, "the company only had to give what they wanted or they could even take away."[6]

The Administrative Law Judge found that Rogers' remarks to Hannan constituted "permissible expression of views" and did not violate Section 8(a)(1) of the Act. We disagree. Thus, the facts, which, as noted, are undisputed, reveal that the above-mentioned incident, which occurred just a few days after Respondent unlawfully solicited its employees' grievances and began its unlawful surveillance of their activities, was initiated by Rogers in an obvious attempt to solicit from Hannan any grievances she may have had. Apparently dissatisfied with Hannan's reluctance to discuss any such grievances, Rogers then "invited" Hannan into the personnel office where he again sought to engage Hannan in a discussion of her grievances. Having failed in this endeavor, Rogers then interrogated Hannan concerning her need for a "third party" (an obvious reference to the Union herein) to handle her complaints and further expressed his antiunion sentiments to her. The facts further reveal that, in addition to the attempted solicitation of grievances and interrogation of Hannan, which conduct we find violated Section 8(a)(1) of the Act,[7] Rogers also told Hannan that, if the Union came in, "the company only had to give what they wanted or they could even take away." This latter statement, when viewed in light of Rogers' unlawful interrogation of Hannan and his unlawful attempts to solicit her grievances, and when considered in light of Respondent's other unlawful conduct, impliedly threatened a loss of benefits if the employees selected the Union as their collective-bargaining representative. Indeed, implicit in Rogers' statement is the unmistakable inference that existing benefits would continue unchanged if the employees withdrew their support for the Union. Under these circumstances, we conclude that Rogers' remark amounted to an implied threat of loss of benefits and violated Section 8(a)(1) of the Act.[8]

4. Respondent is alleged to have further violated Section 8(a)(1) of the Act by placing locks on its phones to prevent employees from making calls, restricting their access to bulletin boards, and prohibiting an employee from having any further access to personnel files because of her union activities.

With respect to the restriction on the use of phones, the record reveals that, during his December 5 visit to the store, Brownsworth became aware of a large phone bill received by Respondent and, shortly thereafter, instructed Bolding to install locks on all phones, which Bolding did on or about December 11. Respondent contends that this action was necessary because of the large number of personal calls made by the employees.[9] Contrary to the Administrative Law Judge, we find this argument to be pretextual and unpersuasive. Thus, Bolding, testifying for Respondent, candidly admitted that the "excessive phone bills" relied upon by Brownsworth was more the product of a large number of long-distance business, rather than personal, calls that had been made. Furthermore, while Respondent had been receiving large phone bills for several months, it was not until the advent of the Union's organizational campaign that Respondent decided to take some action. Nor did Respondent submit any evidence, aside from its bare assertions, to substantiate its claim that employee personal calls were the cause of the large phone bills. In addition, while Respondent asserts that it had a longstanding policy forbidding personal calls, that policy, according to Respondent's personnel manager, Jan Jones,[10] was never adhered to prior to December 1978. Under all these circumstances, we conclude that Respondent violated Section 8(a)(1) of the Act by denying its employees a previously available privilege and thereby imposing less favorable working conditions because of their support for the Union.[11]

On the issue of the bulletin board, the record reveals that Respondent maintains such a board in the employees' lounge and that on several occasions notices advising employees of upcoming union meetings, placed on the bulletin board by Leingang and other employees, were admittedly removed by Respondent. Bolding testified that the bulletin board, according to store policy, was to be used only for "company-oriented things . . . such as vacation schedules." However, he further testified that this policy was an unwritten one and that the employees may not have been informed of it. He also could not recall when the policy went into effect. The record also reveals that items of a personal nature, such as wedding announcements,

[6] The evidence in support of this allegation is based on Hannan's undisputed testimony. Rogers did not testify at the hearing.

[7] *The Anthony L. Jordan Health Center*, 235 NLRB 1113 (1978).

[8] See *Textron, Inc. (Talon Division)*, 199 NLRB 131 (1972); *Olin Conductors, Olin Mathieson Chemical Corporation*, 185 NLRB 467 (1970).

[9] Bolding testified that in July 1978 he posted a phone bill on the bulletin board to make employees aware of the expenses being incurred by Respondent and further warned them that "the phones would be locked if the personal calls did not stop."

[10] Jones became personnel manager, a supervisory position, on December 17, 1978, succeeding Fournier. Prior to that, Jones was employed by Respondent as office manager, a nonsupervisory position.

[11] *Chandler Motors, Inc.*, 236 NLRB 1565 (1978); *Stoughton Trailers, Inc.*, 234 NLRB 1203 (1978).

postcards, sale notices, births, letters, and illnesses, were frequently posted on the bulletin board. While Bolding testified that on occasion he removed these personal notices from the bulletin board, he admitted that on other occasions he did not. In light of the above, we find that Respondent had no established policy concerning the use of its bulletin board and that, even if such a policy did exist, it was not adhered to by Respondent. Consequently, we conclude that in removing the union notices, Respondent was motivated by its hostility to the Union's organizational campaign and that its conduct therefore violated Section 8(a)(1) of the Act.[12]

The last 8(a)(1) allegation centers on Respondent's taking from employee Joy Stevens the keys to the office and personnel files because of her union activities. The record reveals that Stevens was employed by Respondent as a bookkeeper in the ladies' wear department. Until January 30, 1979, she also kept the keys to the office door, file cabinet, and personnel files. According to Stevens' undisputed testimony, on that date Jeff Gill, Respondent's ladies' wear department manager,[13] informed Stevens that, because of a new policy established by Respondent, the personnel files would be kept locked up and in his personal possession and that she would have to turn in her office and personnel file keys. Stevens became very upset over this. The following day, Gill summoned Stevens into the office to discuss her attitude of the previous day. The conversation eventually drifted into a discussion of employees' purses and Hannan, who was nearby, subsequently joined in the discussion. Eventually, the conversation returned to the issue of the keys. At this point, Stevens asked Gill why her keys had been taken away and Gill, after repeating that it was a new store policy, finally stated that it was because of her union activities. Gill did not testify at the hearing.

The Administrative Law Judge refused to find that Respondent violated the Act by removing Stevens' keys. Rather, he found that Gill's statement was made in jest and could not reasonably be taken seriously. Indeed, he found the entire incident to be "half-comical." We find, however, that there is nothing in the record to support the Administrative Law Judge's findings in this regard. Rather, the undisputed testimony presented by Stevens and Hannan concerning this incident contains no evidence which would indicate that Gill's statement was made in jest. In fact, the evidence supports a contrary finding. Thus, it is reasonable to assume that Stevens would consider a discussion of her attitude with her department manager to be a serious matter. Indeed, Stevens testified that she became very upset during the conversation.[14] In view of the above, we find that Gill's statement to Stevens—that the keys were taken away because of her union activities—was not, as found by the Administrative Law Judge, made in jest, but rather reflected the true reason for Respondent's actions. Consequently, we conclude that Respondent took away Stevens' keys solely in retaliation for her prounion sympathies and thereby violated Section 8(a)(1) of the Act.

II. THE 8(A)(1) CONDUCT

As previously stated, we agree with the Administrative Law Judge that Respondent did not unlawfully discharge employee Bundy and did not unlawfully alter employee Leingang's job duties. We disagree, however, with his finding that the warnings issued to Leingang on January 5 and February 5, 1979, did not violate Section 8(a)(3) and (1) of the Act and with his finding that Leingang's termination also did not violate Section 8(a)(3) and (1) of the Act.

A. *The Warnings*

With respect to the January 5 warning, the record reveals that sometime either on January 3 or 4, 1979, Leingang made a tentative appointment to see her doctor at 3:30 p.m. on January 5. According to Leingang's undisputed testimony, she then notified her office manager, Linda Davidson,[15] of the appointment, stating that it had yet to be confirmed. Davidson replied that it was okay but to let her know. On the morning of January 5, Leingang reminded Davidson of her appointment and stated that she wished to leave at 2 p.m. in order to go home and wash up before the appointment. Davidson, according to Leingang's uncontroverted testimony, replied that it was okay and that she would let the personnel manager, Jan Jones, know. Around 1 p.m. that same day, Leingang met Jones and informed her of her appointment. According to Leingang's undisputed testimony, Jones accepted this notification. Jones, however, in-

[12] The Administrative Law Judge, in relying on *Group One Broadcasting Co., West*, 222 NLRB 993 (1976), to support his refusal to find a violation, failed to note that in *Group One Broadcasting* the Administrative Law Judge, with Board approval, found on facts strikingly similar to the ones herein that the respondent therein had violated Sec. 8(a)(1) of the Act by refusing to allow an employee to post a union notice on its bulletin board.

[13] The Administrative Law Judge found Gill to be an agent of Respondent.

[14] Hannan testified that, prior to joining the conversation, she overheard Stevens crying. She further testified that Gill was not being sarcastic when he informed Stevens that her keys were taken away because of union activities.

[15] Davidson succeeded Jones as office manager sometime in early January 1979.

formed Leingang that she (Jones) would have to consult with Bolding to determine whether or not Leingang would be allowed to make up the hours on another day. Shortly thereafter, Jones informed Leingang that Bolding had denied her request to make up the lost time. Later that afternoon, as Leingang was leaving for her appointment, Bolding summoned her into the personnel office and gave her a written warning, on a form known as a "Personnel Interview Record," purportedly for not notifying Jones in advance of her doctor's appointment.

The Administrative Law Judge, agreeing with Respondent, found that the warning issued to Leingang on January 5 was justified in view of Leingang's failure to timely notify Jones of her absence, and did not violate Section 8(a)(3) and (1) of the Act. We disagree with this finding.

Respondent has tried to make much of the fact that the notification given to Davidson by Leingang was insufficient since employees were required to notify the personnel manager in the event of absences. However, Leingang testified, without contradiction, that when Jones was office manager she (Leingang) frequently notified Jones of any absences and not the personnel manager. Jones, while denying that as office manager she had had the authority to excuse absences, nevertheless admitted that Leingang may have notified her of these absences. Thus, it appears that when Leingang notified Davidson she was merely following a past practice established by Davidson's predecessor, Jones. Furthermore, it is not unreasonable to assume, in view of this past practice, that Leingang would have relied on Davidson's assurances that she would notify Jones of the absence. More significant, however, is the fact that, as noted above, Leingang did notify Jones of the appointment and upcoming absence and that Jones accepted this purported late notification without comment. Furthermore, the record is devoid of any evidence to indicate what, if anything, would have constituted appropriate notice under these cirucmstances.[16] In view of the above facts and in light of Respondent's knowledge of Leingang's union activities,[17] we find that the reason given for the January 5 warning to Leingang was pretextual and that said warning was issued for her union activities in violation of Section 8(a)(3) and (1) of the Act.

With respect to the February 5 warning, the record reveals that sometime in mid or late January 1979 Leingang began wearing slippers to work because of a severe foot problem. On January 30, Jones, noticing that Leingang was wearing slippers, stated to Leingang that she was not picking on her but that she would not be allowed to wear slippers to work anymore. Leingang informed Jones of her foot problem stating that she would begin wearing regular shoes as soon as possible and offered to obtain a doctor's excuse. According to Leingang's uncontroverted testimony, Jones replied that "it wouldn't do a damn bit of good to get a doctor's excuse anyway."[18] In view of Jones' remark, Leingang did not obtain a doctor's excuse but continued to wear slippers to work.

Several days later, on February 5, Leingang was summoned into Jones' office where she met with Bolding, Jones, and Respondent's merchandising manager, Tantillo. During the meeting, Bolding reminded Leingang of Jones' earlier instructions concerning her use of slippers and then informed her that, by February 9, she was to have either different footwear or a doctor's statement reflecting a medical condition justifying the use of slippers. Thereafter, Leingang was written up on a Personnel Interview Record, similar to the one issued to her on January 5,[19] for wearing unsafe shoes and the record was placed in her personnel file. On February 9, Leingang reported to work in a different pair of shoes.

While Respondent contends that the above writeup was not intended to be either a warning or any other type of discipline, the General Counsel urges that the writeup constituted a warning issued to Leingang, not, as asserted, because she was wearing unsafe shoes, but rather for her union activities. The Administrative Law Judge agreed with Respondent and found that the February 5 writeup did not violate Section 8(a)(3) and (1) of the Act. We disagree.

Respondent had attempted to downplay the significance of the February 5 interview and subsequent writeup of Leingang. It is evident to us, however, from the fact that several of Respondent's high-level supervisors were summoned to this meeting and from Bolding's reminder to Leingang of Jones' earlier admonishment, that the interview was intended to be disciplinary in nature and not

[16] Bolding testified that management wanted to be advised of an impending absence "as soon as possible" so that it could reschedule other people to that particular area. We fail to see how Leingang could have notified Jones any sooner of her upcoming appointment since the appointment was not confirmed until approximately noon on January 5. Furthermore, Bolding admitted that Leingang's absence would not require the rescheduling of other personnel.

[17] As noted, *supra*, Respondent admits having had knowledge of its employees' union activities as early as December 5, 1978. Furthermore, Davidson testified, without contradiction, that when she became office manager in early January 1979 Jones, her predecessor, told her that Leingang and another girl were "the ones who had started the Union in the Store."

[18] Employees Davidson and Johnson corroborated Leingang's testimony in this regard.

[19] The January 5 warning, unlike the one issued on February 5, has a "conduct" box checked off.

merely informative. Indeed, we are further convinced of this fact when we note that the interview was recorded on a form regularly used by Respondent to record disciplinary warnings, and placed in Leingang's personnel file. Under these circumstances, we conclude that the February 5 writeup constituted, as alleged by the General Counsel, a disciplinary warning.

Additionally, we find merit to the General Counsel's contention that the stated reason for the warning, wearing unsafe shoes, was pretextual in nature and that the warning was, in fact, issued because of Leingang's union activities. The record in this regard reveals, and, indeed, Respondent admits, that it has no written safety rule concerning shoes. Furthermore, while it appears that employees were told, when the store first opened, that they were required to wear closed-toe safety shoes, the evidence clearly indicates that that policy has not been followed. Thus, according to Leingang's and Hannan's uncontroverted testimony, store employees have worn a variety of different footwear, such as tennis shoes, clogs, high heels with open toes, slippers, "slip ons," and rubber thongs, to work. Furthermore, the record is devoid of any evidence to establish that other employees had been disciplined or received warnings for similar conduct. In light of the above, we conclude that the February 5 warning, as with the January 5 warning, was issued to Leingang because of her union activities and that it also violated Section 8(a)(3) and (1) of the Act.

B. *Leingang's Discharge*

The record reveals that Leingang began working for Respondent, in its "cash cage," on November 7, 1977. Subsequently, she was transferred to the store's office, which at that time was managed by Jones, where she, along with employee Cindy Johnson, performed the duties of assistant bookkeeper. On December 5, 1978, Leingang, as previously noted, along with other employees, executed a union authorization card and thereafter became active in the Union's organizational campaign.[20] By its own admission, Respondent became aware of its employees' union activities in early December 1978, and, more significantly, was convinced, according to Davidson's undisputed testimony, that Leingang was one of two employees "who had started the Union in the store."

As noted previously, Jones became personnel manager on December 17, 1978, and was replaced as office manager in early January 1979 by Davidson, who had transferred to the Kent store from another of Respondent's stores on January 2, 1979. Davidson testified, without contradiction, that before she became office manager Brownsworth told her that, "if [she] became office manager, he wanted [her] to pressure Cindy [Leingang] into quitting"; that when she became office manager Jones also instructed her to keep an eye on Leingang and further ordered that Leingang was not to leave the office without Davidson's permission. No similar restrictions, however, were placed on Johnson, the other employee. Davidson also testified that the day following her conversation with Jones she was summoned into either Jones' or Bolding's office and questioned concerning Leingang's alleged repeated trips out of the office and to the restroom.

On March 23, 1979, Leingang informed Bolding that, because of the continued following and harassment she had been receiving and because her job duties had been reduced,[21] she was quitting her job. The Administrative Law Judge found that there was no basis for treating Leingang's decision to quit as anything other than voluntary, and, therefore, concluded that Leingang was not constructively discharged, as alleged by the General Counsel. We disagree.

Leingang's decision to terminate her employment with Respondent was, in our view, precipitated by the latter's continued harassment of Leingang and by the imposition of more stringent working conditions on her because of her union activities. Thus, as noted above, Leingang signed an authorization card on December 5, 1978, and shortly thereafter Respondent, having learned of the Union's attempts to organize its employees and of Leingang's role as a leading union adherent, began, *inter alia*, to follow Leingang, and other suspected union supporters, around the store continually, even on their nonworking time. In addition, Leingang was prohibited from freely leaving the office, even to use the restroom, without first obtaining permission from Davidson, something other employees were not required to do. Furthermore, as noted above, Respondent, in a 1-month period,[22] issued two written warnings to Leingang, both of which we

[20] Leingang solicited an authorization card from at least 1 other employee, Barbara Bundy, and further placed on Respondent's bulletin board approximately 9 to 12 notices advising employees of upcoming union meetings.

[21] The Administrative Law Judge found, *inter alia*, that Leingang's job duties had, in fact, not been reduced and that consequently Respondent had not violated Sec. 8(a)(3) and (1) of the Act in this regard, as alleged by the General Counsel. The record, in our view, clearly supports the Administrative Law Judge's finding concerning this allegation and we, accordingly, adopt said finding. Our finding herein, however, does not affect our conclusion, *infra*, that Respondent constructively discharged Leingang in violation of the Act.

[22] There is nothing in the record to indicate that Leingang had ever received any written warnings prior to these.

have found violated Section 8(a)(3) and (1) of the Act. In light of the above facts, we are convinced that Respondent, by engaging in the above conduct, was, as stated by Brownsworth to Davidson, pressuring Leingang into quitting and, in fact, succeeded in doing so. Under these circumstances we conclude that Leingang's termination constituted a constructive discharge in violation of Section 8(a)(3) and (1) of the Act.

THE REMEDY

Having found that Respondent constructively discharged Cynthia Leingang and issued written warnings to her because of her union activities, and that it unlawfully interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, we shall order it to cease and desist therefrom, and to take certain affirmative action which we find will effectuate the purposes of the Act.

Respondent will be required to offer Cynthia Leingang full and immediate reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and to make her whole for any loss of earnings she may have suffered by reason of the discrimination against her, such earnings to be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[23]

Respondent will further be required to rescind and remove from Cynthia Leingang's personnel file the warning notices issued to her and will be required to notify her, in writing, of its actions.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, K-Mart Corporation, Kent, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing the termination of or otherwise discriminating against employees because of their membership in or support of Retail Store Employees Union Local 1001, chartered by United Food and Commercial Workers International Union, AFL-CIO, or any other labor organization.

(b) Reprimanding or issuing warning notices to employees because they have engaged in activities on behalf of the above-named Union, or any other labor organization.

(c) Engaging in, and creating the impression of, surveillance of its employees' union or protected concerted activities.

(d) Soliciting, promising to correct, and correcting employees' grievances in order to dissuade them from supporting the above-named Union, or any other labor organization.

(e) Threatening employees with loss of benefits if the Union, or any other labor organization, were selected as their collective-bargaining representative.

(f) Interrogating its employees concerning their union activities.

(g) Denying its employees access to telephones because they have engaged in union or protected concerted activities, or otherwise discontinuing employee privileges or creating less favorable working conditions in order to persuade its employees to discontinue their support for the above-named Union, or any other labor organization.

(h) Removing from its bulletin board notices concerning the above-named Union, or any other union, which have been posted by its employees.

(i) Removing job duties assigned to employees in order to create the impression that said employees should not be trusted because of their union or protected concerted activities.

(j) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following action which is necessary to effectuate the policies of the Act:

(a) Offer Cynthia Leingang immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of pay she may suffered by reason of the discrimination against her in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Rescind and remove from Cynthia Leingang's personnel file the warning notices issued to her on January 5 and February 5, 1979, and notify her, in writing, of said action.

(d) Post at its place of business in Kent, Washington, copies of the attached notice marked "Ap-

[23] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

pendix."[24] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places at all locations where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

[24] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT cause the termination of or otherwise discriminate against our employees because they are members of or have engaged in activities on behalf of Retail Store Employees Union Local 1001, chartered by United Food and Commercial Workers International Union, AFL-CIO, or any other labor organization.

WE WILL NOT create the impression that our employees' union activities are being kept under surveillance, or actually keep our employees' union activities under surveillance.

WE WILL NOT solicit and correct or promise to correct our employees' grievances in order to dissuade them from supporting the above-named Union, or any other labor organization.

WE WILL NOT threaten our employees with possible loss of benefits if they were to select the above-named Union, or any other union, as their collective-bargaining representative.

WE WILL NOT interrogate our employees concerning their union activities.

WE WILL NOT deny our employees access to telephones because they have engaged in union or protected concerted activities, or otherwise discontinue employee privileges or create less favorable working conditions in order to persuade our employees to discontinue their support for the above-named Union, or any other labor organization.

WE WILL NOT remove from our bulletin board notices concerning the above-named Union, or any other union, which have been posted by our employees.

WE WILL NOT remove regularly assigned job duties from employees in order to create the impression that employees who engaged in union and/or protected concerted activities are not to be trusted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Cynthia Leingang immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and WE WILL make her whole for any loss of pay she may have suffered by reason of our discrimination against her, with interest.

WE WILL rescind and remove from Cynthia Leingang's personnel file the warning notices issued to her on January 5 and February 5, 1979, and shall notify her, in writing, of our actions.

K-MART CORPORATION

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge: This case, as fully consolidated by order dated September 11, 1979, was heard in Seattle. Washington, on the dates June 21 and 22 and October 1, 1979. Based on complaints alleging that K-Mart Corporation, herein called Respondent, violated Section 8(a)(1) and (3) of the Act by terminating Barbara Bundy on January 31, 1979, notwithstanding that she had sought to revoke her pendinq resignation; by causing the termination of Cynthia Leingang on March 23, 1979, and by restrictions relating to office telephones located in the proximity to where Leingang worked, by altering her job duties, and by issuing written warnings to her. During the period December 1978 through January 1979, Respondent violated the Act when it had committed various acts of interference, restraint, and coercion by promising improvements in benefits and working conditions, by soliciting employee grievances and problems with later resolution (or promise of resolution) in connection with them, preventing outgoing calls by placing locks on office telephones; by interrogating an employee concerning her activities on behalf of Retail Store Employees Union Local 1001, chartered by United Food and Commercial Workers International Union, AFL-CIO, herein called the Union; by threatening an employee with changes in her job duties because of union activities; by denying employees the asserted right to post notices regarding union meetings on the company bulletin board, while relatedly removing such or certain notices as had been posted; and by denying a clerical employee access to certain business files by taking away her keys.

Upon the entire record,[1] including my observation of witnesses and consideration of post-hearing briefs, I make the following:

FINDINGS OF FACT AND RESULTANT CONCLUSIONS OF LAW[2]

In early December, several employees of the approximately 150 working in the store contacted a functionary of the Union regarding representation and met with him at a nearby restaurant.[3] Those in attendance, including Janet Lamphere, Cynthia (Cindy) Leingang, Cheryl Hannan, and Joy Stevens (who recalled the time as November), signed authorization cards. Kenneth Bolding, store manager, gained contemporary knowledge of this activity when told by other employees that the meeting would take place, and by seeing Lamphere handing out authorization cards shortly thereafter from her work station at a service desk.[4]

On December 8, Lamphere attended an employee meeting in the store, notwithstanding that it was her day off. Shortly after the meeting concluded she was approached in the employees' lounge by traveling Personnel Supervisor June Cozad, and asked about her thoughts. Lamphere replied that she as well as the whole store was griping. Cozad invited her into the office of then Personnel Manager Joyce Pournier; Lamphere entered after prearranged signal among them, causing Leingang, Hannan, Stevens, and cafeteria employee Carol Abbott to join in for discussion. Of Respondent's officials present, were Brownsworth, Bolding, Cozad, and Fournier. Lamphere testified that the meeting began with Brownsworth asking what gripes the people had, to which each employee responded. These focused on the practice of holding employees inside the store after their nighttime quitting hour for an added 15-25 minutes to reduce risk of robbery; the frequent experience of female employees having their purses searched or rifled by unknown persons while they worked; and, as to Abbott, that she was overburdened with cleanup work after her cafeteria area closed. Lamphere recalled that Brownsworth took notes as employees spoke, and said he would look into the various matters. She brought up the subject of an overdue pay raise for herself, and although Bolding said he thought that had been cleared up, she emphasized that an answer was still awaited. Hannan recalled opening the meeting with a question to Bolding about "a previous NLRB charge," which he parried as not germane to the discussion. Beyond this, Hannan confirmed the other subjects and Brownsworth's response to them, adding that the matter of family-based favoritism being shown around the store was also raised. Leingang, who had initially been intercepted by Cozad but then allowed in with the others when she declared herself also possessed of "bitches and gripes," testified that she too questioned why her own "promotional raise" had not materialized. Brownsworth's comment here was that he would look into this. On the general matter of subjects raised by employees, Brownsworth and Bolding concede that that discussion took this course, that soon an alternative system of egress was devised for employees at night (as in effect at certain other stores within the geographical area of Brownsworth's jurisdiction), and that employee lockers were promptly ordered to provide a safe place for purses. As to Lamphere's hoped-for wage increase, Respondent introduced a payroll record showing that 20 employees, including Lamphere, had been granted pay

[1] Certain errors in the transcript are hereby noted and corrected.

[2] All dates hereafter falling in July through December are 1978; those falling in January through June are 1979, unless in either case expressly shown otherwise.

[3] Respondent is a corporation engaged in the retail sale of merchandise at Kent, Washington, annually deriving gross revenue in excess of $500,000, while selling goods or providing services as to constitute outflow of a total value in excess of $50,000, and purchasing goods and materials as to constitute inflow valued in excess of $50,000. I find, as is admitted, that Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act; and that the Union is a labor organization within the meaning of Sec. 2(5).

[4] The Kent store, open since October 1977 with traditional retail hours 7 days a week, comprises about 30 separate departments and 5 licensed departments of which ladies' wear belongs to the entity K-Mart Apparel Corporation. The management structure under Bolding in December for the regular departments consisted of three assistant store managers, including Alvin Perman and Gerald Lane, and about a dozen department managers. Not every store department had a manager, and as to these the employees reported directly to Bolding or more frequently to an assistant store manager. The licensed departments are supervised separately by the licensee, although on the off days of such managers a member of Respondent's management hierarchy would oversee such employees. Bolding's own superior was Merchandise District Manager George Brownsworth.

raises effective November 30, and that Brownsworth had initialed this on December 9 to denote logging into his own managerial records.

General Counsel's witnesses also testified to another aspect of this meeting. It relates to a legal issue of agency yet to be treated with respect to the licensed ladies' wear department, where the claimed favoritism particularly existed. Hannan, Leingang, and Stevens each testified (Stevens equivocating somewhat as to the utterer) that Brownsworth plainly said he could "fire" any employee of that department if he chose. Brownsworth denied making such a remark.

Paragraph 6 of the complaint alleges that impermissible surveillance of employees occurred beginning immediately after this meeting and continued frequently over at least the next several weeks. Leingang testified that during the very lunch hour of December 8, itself, she and other employees participating in the meeting that morning were pointedly followed by Cozad when they relocated from cafeteria to lounge in order to better converse privately. The following day, according to the testimony of Leingang and Hannan, they were in the store together on days off and experienced being closely followed by Bolding and Cozad, who stayed constantly close to their respective quarry. In Hannan's case, this included an incident as she was discoursing with Men's Wear Department Manager Frances Wesner about unionism, and Cozad interposed herself to ask about the topic under discussion. Hannan concluded this incident by withdrawing to the ladies' wear stockroom into which Cozad seemed reluctant to follow. The next day, December 10, Leingang was in the store with her husband on this Sunday off, and she noticed Bolding following them again. On or about December 12, Lamphere was starting a break from her service desk when she recognized a former male employee who greeted her. They stood talking together near appliances, and Cozad came up brusquely interfering with their conversation by questions of whether Lamphere's friend was a customer needing help. On Saturday, January 6, Hannan, Lamphere, and Leingang were in the store together for shopping and sensed being trailed by Bolding as they left the cafeteria. Hannan then hung back, but was immediately followed closely by Merchandise Manager Ronald Freitas, an admitted supervisor. Hannan rejoined her friends as Bolding continued to watch from nearby. Then Lamphere went off in one direction and Hannan and Leingang in another, only for this pair to be followed incessantly by Holding and Perman as they wandered through departments. Then the three shoppers met at the cafeteria for lunch, Bolding, Perman, Lane, and Freitas were all there at the time. After eating, the employees tested this phenomenon by deliberately splitting up only to have the management trackers do the same and remain closely nearby.[5] Hannan testified that Perman and Freitas dogged her path into the automotive department that afternoon, and that the same evening as she and Leingang were again at the store with their husbands, Bolding spotted them and deliberately followed all movement.

During the same general time period several events occurred, on which specific subparagraphs of one complaint are based. On December 13, Hannan was approached by Ladies' Wear Regional Manager Donald Rogers, with a district manager also present, and asked whether she had complaints about which he might help. She answered blandly, and he invited her into the store personnel office for more undistracted conversation. Here he alluded to "third party" as not desirable in resolving complaints, and that he had nothing good to say about unions. He expressed the wish that Hannan visit other stores and acquaint herself with employee unhappiness under union contract. Hannan recalled his adding that "the company only had to give what they wanted, or they could take away if the union had come in." Rogers did not testify. Hannan experienced a second similar exchange with Regional Personnel Manager Michael Macik on January 5, again with the same district manager present. On this occasion, Macik spoke to her in the ladies' wear stockroom, asking if she had any gripes or complaints that he could take care of. As in her earlier exchange with Rogers, Hannan depicted herself without personal complaints but distressed about conditions throughout the store otherwise as affecting employees with whom she felt rapport. Macik, who did not testify, disclaimed any role outside the ladies' wear department, and when Hannan repeatedly replied to his inquiries that she had no complaints of her own that became "the extent of the conversation." Stevens testified to a third event occurring on January 30, at which time she had been the bookkeeper of ladies' wear for over a year. On that date her department manager, Jeff Gill, took from her the office door key and file key she had routinely used carrying out her duties. He stated the action was because of a new policy calling for personnel files to remain locked and no longer accessible to her. This change upset Stevens, and the following day Gill broached the subject of her attitude. He testified that the subject got switched around and "we talked about many things, and I got very upset and I mentioned Cheryl's [Hannan] purse and that's when Cheryl arrived back there." The matter of Hannan's purse was, in turn, based on an unrelated confrontation originating January 29, when Gill criticized Hannan for stashing "her purse in the ladies' wear department stockroom and that he would write [her] up" for the circumstance. On January 30, Gill had seemingly involved himself with this again by ransacking the stockroom in vain search for secreted purses. This deed merged with the subject of keys on January 31, when, as Gill lectured Stevens about attitude, Hannan appeared on the scene and both female employees lightly ridiculed Gill for his heavy handed snooping the day before. A rather animated discussion coursed among the three, and finally switched again from purses to keys. When this point was reached, Hannan repeatedly remarked to Stevens that the taking of her keys was "because of your union activities." Hannan and Stevens testified that after a short silence following this accusation Gill admitted aloud that the

[5] This testing attributes considerable agility to Dane who is named by Hannan as the follower of Leingang into the domestics department, while also "in ladies' wear with Janet [Lamphere]."

keys were taken because of union activities. Gill did not testify.

The first of two 8(a)(3) principal issues in the case relates to Leingang, who was employed by Respondent in November 1977 for the store's cash cage and then, following surgery around May 1978, was transferred to the general office where she worked thereafter for about 10 months. Initially other persons in this office were Jan Jones, titled either head bookkeeper or office manager, and Cindy Johnson, who came to the Kent store in October 1977 after 2 years' prior employment with Respondent at another location. These three persons were the regular office work force with Jones, whose status in that capacity is at issue with respect to whether or not she is a supervisor as defined in the Act, being generally in charge of Leingang and Johnson who are deemed "assistant bookkeeper[s]." A fourth person, Donna Thompson, while not directly involved in mainstream office work, performed price list corrections at a workplace of close proximity. The private office of Bolding was immediately behind the general office, through which one had to pass in reaching his location. Paragraphs 7, 8, and 9 of the complaint in Case 19-CA-11464 summarize all allegations respecting Leingang, by assertion that Respondent's acts of locking office phones and denying Leingang use of them beginning on or about December 11, altering job duties beginning on or about December 14 in a manner leaving her "only routine work" to perform, issuing her reprimands on January 5 and again on Feburary 5, causing her termination on March 23; and coupling this with telling her that the past surveillance, harassment, and changed job duties had been done because of her union activities, were all violative of Section 8(a)(1) (independently or derivatively) and Section 8(a)(3).

Leingang's usual office duties prior to December were to make entries in the invoice and expense registers, "ledgers" work, regular and batch invoices, open incoming mail, and assist 4 to 8 hours a week in payroll preparation, while also learning bookkeeping functions associated with cost-to-sell and month-end reports. She testified that at some point in December numerous duties were abruptly removed, leaving only the opening of mail and ordinary invoice work. She complained unavailingly to Brownsworth and then confonted Bolding about the change. He would say only that the particulars of employee pay raises "had leaked out," and for this reason he was confining payroll duties to only one individual in order to better pin responsibility for any future disclosures. Leingang testified that she told Bolding that she thought this change was because of her union activities, and to questioning about precise timing of this change he had only answered defensively, "I don't know." Leingang took this opportunity to further ask why locks had recently been placed on office telephones, and beyond referring to "a big phone bill" of the past he "couldn't answer" with any satisfactory explanation why the restriction arose when it did.

The phone topic grew out of events on or about December 11 when Leingang found that lock devices preventing outgoing telephone calls from her office had been affixed to all instruments. In amazement she questioned Jones about it, only to be told that her incessant conversations with Lamphere "about union activities" were the reason. Leingang disputed this accusation of phone misuse terming it as "a bunch of garbage" to which Jones closed out the conversation by saying, "You'd better watch it, sweetheart." Jones denied these essentials, elaborating that Respondent's policy forbade personal calls from company phones. Leingang testified that this prohibition was not applied evenly, as either Jones, herself, or Johnson could simply call a keyholder[6] to unlock the phone when either of them wished to call out. About a week after the restriction was imposed, Leingang elected to make an important call to her doctor from an unattended instrument in the nearby merchandise office, but was caught in the act by Cozad who paged Freitas and then stayed nearby until Leingang's call was finished and the arriving Freitas immediately relocked this phone.

On December 17, Jones became personnel manager at the Kent store (an admitted supervisory position), and was soon replaced by Kenton store transferee Linda Davidson who testified about two remarks made to her in connection with taking this job. One was by Jones who told Davidson that Leingang ". . . along with another girl at the service desk . . . was the ones who had started the Union in the store," and the second by Brownsworth who "wanted me to pressure Cindy (Leingang) into quitting." This testimony, given at the limited-purpose reopened hearing on October 1, 1979, was not contradicted.

An episode occurred during Davidson's initial days on the job that led to the first of two "Personnel Interview Record(s)" that were prepared on Leingang. Her doctor had been unavailable over the holidays just ended, and early in the first week in January Leingang made a tentative appointment to see him that Friday afternoon. She was committed to call back to his office on the day of this presumed appointment for verification, and testified to explaining this configuration of things to Davidson on the morning of Friday, January 5. During her lunch hour that day, she succeeded in getting confirmation of the appointment for 3:30 p.m., and subsequently, shortly after 1 p.m., told Jones she would leave work early to freshen up first at home and then go to her appointment. Leingang testified that Jones accepted this notification, but that on the separate question of whether the time could be made up a check with Bolding would be necessary. Within about 10 minutes Jones appeared at Leingang's office workplace to say that Bolding would not permit the make up of time. Shortly after this, as Leingang was departing, Bolding detained her at the personnel office to deliver the written summary of "conduct" interview, witnessed by Jones and reading:

[6] Such persons are termed "Lincoln(s)" as an intra store code word used in the paging of functionaries with supervisory or expediting responsibility. Several such "Lincolns" are among the management hierarchy to which Respondent admits, while several others to whom this distinction is bestowed are at issue here in terms of supervisory status under the Act or lack thereof.

> Notify doctor appointments in advance—not to be done in future—inform personnel Mgr. not another office person.

About a month later Leingang began to wear slippers at work in an effort to relieve chafing of abnormal foot bones. This caused Jones to speak with her saying, "Just for the record, by the way, I'm not picking on you, but you can no longer wear house shoes to work." Leingang explained that it was a medical problem but Jones sarcastically cut off further discussion but saying, "It wouldn't do a damnbit of good to get doctor's excuse anyway." Leingang continued in this footwear for successive days and on February 5 was called into the personnel office at quitting time where Bolding, Jones, and Merchandise Manager Tantillo were present. Leingang recalled that Bolding alluded to Jones' recent instructions on the subject, said she would need a validating doctor's statement by the coming Friday or be fired, and tendered her a written personnel interview record, dated February 5, but without marking as to "type of interview," which read:

> Cindy was informed on Jan 30 by personnel manager not to wear house slippers. She said she would obtain doctor statement that this was only shoes she could wear. Has not obtained statement to date—will give her until February 9, 1979 to change shoes or get doctor statement that she can only wear house slippers.

On February 9 Leingang appeared for work in a pair of shoes which, while not as comfortable as the slippers had been, were somewhat alleviative of the problem and resulted in nothing more occurring on the subject. However in the approximate 1-1/2-month period after this, Leingang experienced being followed around the store by Bolding and Jones both while on and off duty often from as close as 4 feet behind. This included instances of Bolding shadowing her to the very door of the ladies' lounge, while Jones took the aggravation several steps farther. This development was coupled with an added restriction which Leingang testified was imposed by Davidson, to the effect that permission must be obtained when leaving her desk for any reason.

As time passed during February and March, Leingang testified, her duties remained essentially opening incoming mail, stamping outgoing mail, processing invoices, and, upon "complaining" of little to do, some batch invoice work. She felt that much of her time was wasted and to fill in idle hours she would water office plants or sweep the floor. By late March the perceived following, harassment, and withdrawal of valued job duties became so intolerable that Leingang decided to quit. She told Bolding of this the evening of March 23 in a conversation at the store cafeteria where no one was within earshot (although her hushand was nearby). Leingang testified that she remembered describing what had been happening, and coaxed an admission from Bolding that she had been a good worker. She then directly accused Bolding of having engineered the following, harassment, and withdrawal of job duties "because of the union activities." Leingang testified that at this point Bolding looked down and said, "Yes, and I don't blame you for quitting." The conversation then ended, and her quit was immediately processed through the personnel office. Bolding denies making any admission that Leingang's union activities had influenced him, or saying that he could not blame her for quitting under the circumstances.

Another constructive discharge issue relates to Bundy. She was hired in July and after working 2 weeks as a cashier, transferred to the men's wear department which Wesner managed. In January she signed an authorization card after some persuasion to do so by Lamphere and Leingang. This occurred in the cafeteria and Bundy testified that Bolding walked in as she signed, watching her from a few feet away. Both Lamphere and Leingang corroborate this viewing, which Bolding flatly denies. Bundy testified that Bolding's cordiality toward her ceased from that point onward. Concurrently, fixed at January 15, Bundy experienced some conflict with Wesner arising out of ill-planned work assignments. Bundy "stewed" for a while about her feelings and then on approximately January 22 advised Jones she would quit after 2 weeks. Jones stated this full notice period was not necessary because an employee work schedule was made up only for 1 week ahead. With this, the date of January 31 was anticipated to be Bundy's final workday. However, several days later she spoke candidly with Wesner, and these two resolved any discord in the context of Wesner saying that Bundy was "the best worker she had and [one] she did not want to lose." Bundy then immediately went to Jones seeking to "reverse my notice" and was referred to Bolding on the matter. She asked him to "void my notice," but he refused saying that a stated intent to terminate was "irreversible." Bundy then simply worked out her schedule through January 31, with her cessation of employment under these circumstances constituting the second principal 8(a)(3) allegation of the complaint.

Here, General Counsel relies heavily on the contrast between treatment of Bundy and the handling of employee Kenneth Jaeger's situation the previous summer. Jaeger was hired into the Kent store's stockroom on October 1977 for a job that evolved primarily into receiving duties, checking, and moving merchandise. Jaeger testified that around mid-August he told Fournier that he would quit later that week to take a railroad job. His last day was a Thursday, intending to mesh this with the new job to start the next day. He appeared for work at the railroad company that Friday morning, but was told that he had been expected the day before and through this misunderstanding the job was no longer available to him. Jaeger returned immediately to the Kent store and spoke with Bolding. He asked to be restored and Bolding questioned whether he now intended to "be there a few months." When he affirmed this, it won approval for rehire to his old job. In fact, Jaeger remained only 4 days when the railroad company suddenly came up with the same or equivalent opening, and Jaeger took it by finally quitting from Respondent.[7] Bolding testified that

[7] The separation report prepared on Jaeger at this time was marked that he not be reemployed. It is deducible from the August 24 date of

Continued

the Jaeger incident had roots in spring 1978, when this employee remarked generally that a possible railroad career (following in his father's footsteps) would be deferred for several months. Bolding recalled that when Jaeger appeared back on the critical Friday of August 17 he had not even known of the employee's termination the day before. In dealing with this circumstance, Bolding was influenced by the fact that Jaeger had only missed a scheduled 4 hours of work, and that he needed stockroom help at the time. Based assertedly on Jaeger's assurance of a few months' service Bolding agreed to "continue his employment." Bolding testified to prior instances of employees Annette Jones and Paul Marcus, both of whom were refused reinstatement after and because of their resignations. Bolding characterized Jaeger as "a very good employee," and maintained that his final official assessment that he should not ever be reemployed was because he had resigned after "saying that he was going to stay with us and then leaving us."

Late January was also the time of two other aspects of General Counsel's case. As to one of them Leingang testified that on January 30 she was called into a meeting of employees with Bolding, Jones, and Tantillo present for management. Bolding made inquiry about any complaints or gripes, seeking to prompt discussion keyed to the interrelationship of the general office, merchandise office, and cash cage. The second incident involved Bundy and Ken Rice, a person titled area merchandiser. Over the course of her employment, Bundy had seen Rice stacking merchandise on shelves, approving customer checks, and supervising checkout stands when a regular supervisor was too busy. Rice never supervised her directly other than occasions of asking her to straighten shelves or to leave her men's wear department and go onto checkout work. Bolding testified that Rice was one of three area merchandisers for the store, whose duties are to see that merchandise orders for their area went out on time as well as assisting assistant store managers with check approvals and at the refund desk or checkout locations. Rice is paid an hourly rate that Bolding estimated was in the $4 to $4.50 range. Bolding viewed Rice as "oversee[ing]" checkout stands, but not a person who could change the assignment of other employees. On January 30 Rice had spoken with Bundy asking about the union meeting of the day before, and why he was not invited. She offered to arrange an authorization card for him, and discussion moved to news of her imminent leaving which Bundy said would not happen because she and Wesner had "gotten it all cleared up." The next day she approached Rice asking how he knew of a union meeting the prior Sunday, which he said had been learned after his curiousity caused him to ask "a lot of employees" about it.

A final branch of the case concerns happenings during an approximate 6-week period when key union supporters sought to mount interest in their cause using various bulletin boards around the store. To this end Leingang placed about a dozen notices of scheduled union meetings, often improvising the announcement as to material on which it was written. She recalled using the back of an National Labor Relations Board notice once, and on another occasion a Scott towel from the restroom. Respondent introduced as evidence an announcement printed in red ink above a fold on Form NLRB-4722, Notice to Employees (of a settlement agreement),[8] another printed on the plain reverse side of a sheet from its food manual and a small paper with block printing of a Sunday evening union meeting appearing below a faint K-Mart logo. Most notices placed for this purpose were quickly removed, and General Counsel asserts violation here both because of evidence that key management officials openly performed the removals, and that it was inconsistent with past practice of unpoliced use of bulletin boards for casual purposes such as travel postcards, goods for sale, and personal announcements. Bolding declared that Respondent's policy confined their bulletin boards to items of store business, and admitted to taking down every union notice he found.[9]

Assessment of this case requires fullest awareness of the context into which allegations that the Act has been variously violated are framed. Operative events would seem to commence with the organizing effort begun in December by Lamphere (soon to be prominently assisted by Leingang and others). However, this is too superficial a starting point, for notwithstanding that counsel chose not to develop the subject this record plainly shows existence of a typical settlement agreement signed by Bolding in September, and specifically disavowing future prevention or inquiry "about the activities of our employees in telephoning employees at their homes concerning a union or in handbilling employees' automobiles in public parking lots with material concerning unions." It is also known that Jaeger heard "rumors" about a union as early as August, and he added that "some employees were trying to organize one."[10] The tone of efforts at collective representation as originating in December was subdued and somewhat amorphous, reflective of Leingang's testimony that "nobody" was in charge of collecting authorization cards. While I have no doubt that Respondent disliked the prospect of unionization, and welcomed all developments that fostered its suppression, the controlling question, as always, is whether impermissible conduct was actually perpetrated by its agents. In this sense the case is not so much one of clear-cut action or unmistakably jarring verbalisms, as it is the more vague phenomena of circumspect planting of thoughts and tactical opposition to the opportunity for interest in the Union being spread or strengthened.

The essential first step is resolution of credibility where plainly necessary. Overall, my definite impression is that General Counsel's witnesses were accurate in much of what they recalled *seeing*, but quite unreliable

this report that Jaeger gave his first notice of quitting to Fournier on August 14.

[8] Leingang admitted to seeing one posted in this manner, but denied she had done it. She also denied using a company food manual page in testimony that described how "several of us" were involved in preparing the postings.

[9] This point coincides with what Leingang had observed. While both she and employee Dori Wimmer contradict Jones with testimony that she too had pulled such notices.

[10] It is stipulated that no representation petition was ever filed at times material to this case.

from suggestiveness, partisanship, and unfamiliarity with the delicate task of fairly recalling past remarks, in their testimony as to what was *said to them*. Conversely, Respondent's witnesses were deliberately evasive in several denials respecting their conduct, yet I find each of them persuasive and plausible in their version of conversational exchange. This is not a lumping together of witnesses by party, but separate evaluations by which Lamphere, Leingang, and Hannan tended to hear what they had programmed themselves to hear, while Bolding and Jones denied being in places or doing things, which certainly they were or which did happen. Leingang and Bolding are the chief antagonists, and on demeanor grounds I find them far more reliable as to what was said between them.

Of all statements attributable to Respondent's agents, the most crucial is that between Leingang and Bolding as she advised of quitting. If Bolding truly made the described utterance it is not only telling evidence in support of the "constructive" discharge theory, but tends to color all of Respondent's conduct with respect to other employees and the very nature of their campaign to neutralize union activities. I am thoroughly convinced that Leingang's version is inaccurate, misleading, and founded on a hypersensitivity which by then had reached near-paranoid proportions. First it should be noted that it was her habit to bray out the magic words when displeased or disappointed. In December she had accused Bolding of taking away job duties because "I had signed a union card."[11] On a second occasion in February, as office employees met with management, she had again claimed her woes were "because of the union activities." Her last contact as an employee was March 23, and correspondingly, her last realistic opportunity to get rise out of this provocative theme. I conclude that she distorted whatever mannerism or platitude Bolding assumed or uttered in maintaining conversational courtesy during the exchange and that she has wrongly depicted his words. In other ways Leingang is quite unimpressive as a witness. She totally vacillated about whether Jones had invited use of office phones for personal calls versus simply never expressly prohibiting it, and her handling of chronologies does not inspire confidence in her memory. For example, she was astonishingly uncertain about whether the sudden loss of phone privileges occurred in December or in January, and on a separate point managed to testify that (while not really recalling the date) she first complained to Brownsworth about lessened job duties in "Maybe late December, first part of January and" *later* spoke to Bolding about, it thinking that this occurred "the latter part of December, the 29th, 28th." Although, as stated above, I am selective in what I accept of Bolding's testimony, on this key point my credibility resolution is to emphatically discredit Leingang and find that Boldinq in no way conceded that her decision to quit was predestined by Respondent's unlawful machinations.

Beyond this key credibility resolution, there are several areas in which collateral issues of agency status must be treated before reaching the ultimate unfair labor practice allegations. One of these relates to Jones, who headed the office operation until mid-December. With most supervisory indicia concededly negated by testimony, the focus is on her role in assignment of work or such other manifestation as might have constituted her a supervisor. She was the most experienced of those performing office bookeeping work; mainly worked on transfer of figures to the invoice register; had primary responsibility for preparing weekly store payroll; and was paid an hourly rate of approximately $5.30 compared to Johnson's $4.75 and Leingang's $4. She trained colleagues in payroll work, and was assisted in this training as to other office routines by Bolding. Leingang testified that she notified Jones of miscellaneous time away from work as prelude to it being an approved absence. I discredit this perception of Leingang, believing it is but another instance of her confused view of relationships around the workplace. Jones credibly denied that she had responsibilities in this area, and notes that Bundy guilelessly testified that the personnel manager is "who you're supposed to report to" with respect to absences. Jones' position, and that of Davidson who succeeded her, is no more than a senior lead person in a highly structured office setting with paperwork routines well established and of self-evident approach. This is exemplified by Jones' forceful testimony that when vacationing she left office functioning "up to their (Johnson and Leingang) better judgment on how to handle it" because "the duties were there." She had no real occasion to exercise the "independent judgment" required by the statute, and of the secondary factors General Counsel points to, such as access to cash cage and pacifier of the feuding Cindys these are quite irrelevant to the issue. Equally unavailing is argument that a pure agency condition has been shown within meaning of Section 2(13) of the Act, for this theory simply reiterates the argument of supervisory status using other words and the odd contention that because Leingang spoke to Jones about the locked phones this reasonably created the condition of apparent authority for Jones to bind Respondent by her acts.[12]

General Counsel has alleged that Rice is a statutory supervisor, the importance of which is whether or not remarks uncontradictedly made by him are attributable

[11] I have not formally corrected the transcript, however, every indication is that the final word "he" should be "I." The sense of Leingang's testimony through this passage does not fit with an abrupt claim that Bolding confessed to being motivated by her "union activities and signing the card." Further, at the reopened hearing she was asked the essentially same question ("Did you ever talk to anyone in management about this? Did you ever complain to anyone in management about not having enough to do?") and did not describe Bolding's response as being remotely like this. For the same reasons as influence my overall view of Leingang's credibility, I expressly discredit any suggestion of testimony that attributes to Bolding an acknowledgment he was aggravating her at the time "because of union activities and signing the card." It is probable that this accusation was made repeatedly by Leingang to Bolding, for that is the sense of her final testimony on the point. Leingang was so imbued of this notion as to answer categorically when General Counsel's questions sought only a point in time, the resulting awkward situation dissolving only by means of a droll rephrasing to break her fixation.

[12] Irregardless of the resolution respecting Jones' status, I discredit testimony of Leingang that Jones articulated "union activities" as an influencing reason for the locking of phones. Jones credibly denied such a remark, and while I believe an animated exchange occurred between them on this occasion, I find it implausible that Jones went beyond her evident loyalties of relating excessive phone usage to an adverse impact on productivity.

to Respondent. The skeletal facts of his job are known from general description by Bundy and Bolding, as mentioned above. In more particular regard, Bundy testified that "as far as [she] knew . . . [he] told people jobs to do and things like that." She had occasionally responded to his reassignment calls, but felt free to demur, at least temporarily, when he picked her. Bundy's association of Rice to the store's corps of "Lincolns" is quite immaterial to the issue. In this she testified first that Rice had disclaimed "really" being a Lincoln because he punched a timecard and was excluded from that group's business meetings, although she had routinely heard him paged as a Lincoln. She shakily defined a Lincoln as "assistant managers which K-Mart has two or three or four . . . . I don't know." An outgrowth of this testimony was her further confirmation that aside from Wesner as her regular department manager, she took instructions from Lincolns although nobody had ever told her to take orders from Rice as a person. This vague and unsupported perception is subordinate to Bolding's clear delineation of management hierarchy, in which he specified several layers of supervision (including specialty areas such as personnel and security) and contrasted these with the Lincoln concept as only "a code to call, instead of using the person's name." When searchingly examined about this, he depicted the area merchandisers' role as one of expediting and confirming the flow of goods into given portions of the store. The area merchandisers' prime relationship was to the single merchandise manager responsible for the entire store, not to employees with whom contact occurred. Pudwill's testimony on the point is illuminating in that she had three different supervisors in her primary checkout occupation, over and above fundamental assignments to either checkout or service desk by Fournier at the time, and that she readily declined any request of Rice that she work elsewhere, treating it just as she would "regular service desk employees that would ask [her] a question like that." There is no claim that Rice possessed any major duty of a statutory supervisor, and his propensity for seeking to employ people is not shown to embrace any element of "independent judgment" nor was it even an "exercise" of authority within the meaning of the Act because employees are not shown to have been sufficiently subject to his wishes. Rice's position was intermediate in the sense that he was mobile, was a check approver (an aspect having no real relationship to the supervisory issue here), and for operational convenience was wired to the Lincoln technique of summoning. Bundy and Pudwill, the witnesses testifying as to contacts with Rice had ample layers of supervision exclusive of him and Rice is shown to be paid merely an hourly wage rate "very close" to other employees on the floor. While all mainline store supervisors are Lincolns, it is not established that all Lincolns are supervisors, and I find that Rice is not Respondent's supervisor or agent. *Helena Laboratories Corporation*, 225 NLRB 257 (1976), and *Han-Dee Pak, Inc.*, 232 NLRB 454 (1977), cited by General Counsel as to this issue, are each clearly distinguishable on their facts.

Respondent has resisted the contention that management personnel of K-Mart Apparel Corporation may be brought into dynamics of this case. I disagree. While technicalities of the license agreement and corporate status are not known, the situation is amply one of joint employment by Respondent and this named licensee as the separately identified ladies' wear department. In this special point I credit the testimony of General Counsel's witnesses who recalled Brownsworth saying he could fire employees of such a department if he chose. Circumstances of the December 5 meeting, at which this remark arose, make it a probable utterance or at least closely enough so that the impression was conveyed. This is particularly true were Brownsworth himself did not "recall the exact words" even as to Respondent's authority over K-Mart Apparel Corporation employees. The conclusion is buttressed further by a showing that such employees mingle routinely with Respondent's, are included when store employees assemble for meetings, are indistinguishable to the public, and are checked by Respondent's officials when supervision would otherwise be nonexistent. On this basis I find Rogers, Macik, and Gill each to be agents of Respondent for decisional purposes.

When introducing rationale that applies to disposition of this case, I alluded to the significance of context. Beyond matters of tone, mood, and background, touched on preliminarily, there are numerous specific items of evidence that serve to illustrate why Respondent's overall motivation must be characterized as a tactical reaction to incipient unionism rather than the distinctively different behavior of unlawfully committing unfair labor practices. Respondent concedes early knowledge of concerted activity as this arose pronouncedly (apart from whether it existed sporadically over many prior months) in early December. It also sought to regularly remind employees that typical union activities, including solicitation of authorization cards, was not to be done while on active working time. I disbelieve Brownsworth's assertion that his extensive pre-Christmas visit to the store, coinciding as it did with Cozad's, was purely to fulfill usual controls of regional management. Contrarily, I believe he and other management personnel were keenly concerned with a surge of interest in the Union, and he sought to counteract it by arguably overstepped means. On the other hand change is constant in a workplace, and here the events are clouded by idiosyncrasy among those supposedly squelched as they exercised protected conduct. Leingang in particular was given to exasperable acts, and invited some measure of reining in lest ordinary expectations and discipline break down. This is chiefly observable in the very first episode of the case, when she practically barged into a meeting originally shaping up only between Cozad and Lamphere. While employees must be free at all times from infringement on Section 7 rights, evidence literally showing that Leingang was told not to "bother" being present at this meeting, and that she persisted because of her own "gripes," is pertinent. The fact that she was admitted does not affect an obvious conclusion that Respondent would presumably prefer Leingang productively working at her desk, rather than racing to unburden her longstanding (noting the implication that these predated the "organizing drive" which par. 5 of the original amended consolidated complaint

identifies as the origin of events here "gripes and bitches."

Much context of this case emanates from the general office, where for a critical time Jones (succeeded by Davidson as surrogate housemother to the fretful feudings of their female colleagues), Johnson and Leingang functioned together in a tense and testy standoff. Beyond chronic personality clash there are specific lacings that surely served to keep a crackling ill will always close below the surface. Johnson testified that she made a parody of management's occasional wonderment as to Leingang's whereabouts by sarcastic mockery on the point. This sarcasm was answered in kind during the slipper caper, which was initiated by Jones' snide restriction of late January. Other inflammatory exchanges have already been catalogued, such as the "garbage" and "sweetheart" verbiage, and the overall assessment of matters must be founded on a realization that these people seemingly enjoyed irking one another.

As to specific allegations, the locking of telephones arose first. It is definite that excessive telephone costs had caused Bolding to raise this subject in a meeting with employees only several months earlier, and to post the offensive bill as a graphic reminder of his wish for economy. Also at some earlier point telephones in the store's patio department had been locked. As an abstract matter an employer would have plenary jurisdiction over how employees use provided telephones. This abstraction is subject to the very theory raised in a paragraph of one complaint, refined in the course of trial to an issue of whether timing, effect, or disparate application of this change is unlawful. Overall, the matter is too conjectural to warrant a finding of violation. Brownsworth's choice of this particular time to implement the limitation warrants scrutiny, but alone or in combination with all other aspects of the case cannot justify an inference of actionable assault on employee rights. *Effect* of the change, and any related *intent* to the extent it might be arguably involved, is largely an unavailing approach. No real inhibition to employee organizational rights resulted from this decision, and to the extent that certain employees had actually set up a network of quick communication to counteract management authority, the prohibition had some validity. I again allude to the notion that during working time it is incumbent on a person to give service; not to dally in the self-appointed role of tactician. This ties closely to the matter of disparate treatment, for although Leingang may have experienced close monitoring she had invited this by her general attitude, admitted receipt of an average of two extraneous personal calls a day, and occasional surreptitious wanderings from duty. The complaint alleges this conduct to have a "chill[ing]" objective, yet this seems quite remote in view of the ease and frequency with which employees interacted throughout the store, both within and outside working hours. I find Bolding's denial of using his own office phone for personal calls insincere, noting that Jones freely admitted the practice was rampant. While the limitation may have inconvenienced Leingang, many routine changes in a work setting do so, and I cannot find that this matter arose to the level of an unfair labor practice.

The unlawful solicitation of grievances was alleged to have occurred on three separate dates. In the first of these on December 5 Brownsworth was the chief spokesman for management, and I find his remarks to have been permissibly inquisitive about the general views of employees. The episode arose with casual inquiry by a traveling personnel representative of Respondent and although again the timing is suspect, this is a common role of such a functionary. The matters treated were routine housekeeping conditions in the store, and as to Lamphere's wage increase the best evidence on the point shows it was already in effect.[13] Notably, too, there was no overt relating of management's receptiveness to any union activity pending or prospective, nor were the promised changes here held out as a benefit in lieu of unionism. See *The May Department Store Company d/b/a The M. O'Neil Company*, 184 NLRB 629, 634 (1970).

On December 13 Rogers spoke to Hannan, yet close examination of his words shows them merely as permissible expression of views. The "third party" reference is unmistakable, but again as with Respondent's other overtures was so innocuous as to be marginally permissible. See *Anderson Air Activities, Inc.*, 128 NLRB 698 (1960); *Superx Drugs*, 170 NLRB 911 (1968). Here again Hannan did not mince words as she characterized other employees to be "shit on," and commonsense dictates that fractious talk such as this stimulates candor in return. On a second aspect of the exchange with Rogers, as prompted by a baldly leading question, Lamphere dubiously recalled the "take away" theme. Again I find that in such circumstances this is but a statement of opinion, and neither an unlawful threat nor an actionable component of doctrine relating to employer solicitation of employee grievances. This interchange was denominated in the complaint as an interrogation, yet in content it falls short of that and as a potential unlawful solicitation of grievances is similarly not supported with sufficient proof. See *T.M. Duche Nut Co., Inc.*, 174 NLRB 457 (1969), in which it was held that noninflammatory attempts to "explain" the consequences of unionism are not unlawful when context compels such a conclusion.[14] The matter of taking away benefits has always been an implicit part of the negotiation process, as such is an aspect of the larger realm of collective bargaining, and this reality is both historically recognized and increasingly appearing in literature of the field. See "News and Background Information," 102 LRRB 326 (Bureau of National Affairs, Inc.), referring to "Takeway demands" advanced by International Harvester Company in its bargaining with the UAW. Similarly the terminology of "sacrifice" and "elimination" of benefits under the revised Chrysler Corporation contract was expressed at 103 LRR 111, while that of the CWA in upcoming bargaining with the Bell System included a resolve to strike if management attempted to "eliminate [the COLA escalator feature of

[13] Lamphere testified that she "got the pay raise in my next paycheck after the meeting." This would literally have been the very afternoon of the meeting, and General Counsel made no showing that it was on any later date. On this basis one of the specific grievances allegedly solicited and resolved was a *fait accompli*, and therefore utterly free of any taint.

[14] The instance of Macik having spoken even more casually with Hannan on January 5 merges with my resolution here.

the current contract] or weaken it . . . ." 103 LRR 228. See also *Herbert Halperin Distributing Corp.*, 228 NLRB 239, 245 (1977), where comment about how "certain present benefits could be traded off . . ." in context of an employer's opposition "to the unionization of its employees, as it is entitled to be . . ." was held not to be a violation of law.

The final alleged solicitation on January 30 is even more insignificant, both because of its remoteness from the flurry of events that had occurred in December and because probative evidence of this episode shows it to be little more than an expectable periodic meeting of employees contemplating only resolution of daily operational problems. It is well to emphasize here that nearly 2 months had passed since the advent of union activities and although union meetings were being publicized to take place at around that time, the more appealing point is that no significant progress was seemingly underway for which Respondent need then contend.

Another episodal allegation is the one involving Stevens in late January. Here General Counsel would predictably argue that Gill's undenied statement that he had really taken away keys because of union activities touching his department, is a sure link to the unfair labor practice finding being sought. I disagree. Aside from whether a deliberate change in an employee possessing or not possessing certain business keys is, as alleged, even discrimination within Section 8(a)(3) or a derivative violation of Section 8(a)(1), it would be naive to think that under the known circumstances Gill's reaction was serious or could be reasonably taken as such. The entire episode was half-comical as it unfolded, and Gill was repeatedly goaded by Stevens and the intermeddling Hannan to admit to unlawful motivation. By late January Leingang had long since cemented a triteness to the phrase "union activities," and on balance I conclude that Gill's words, the inflection of which are not even known, could not be other than jesting.

The first ongoing type conduct that I treat was that of the struggle over bulletin boards. A parallel is present here to the matter of locking phones or, given that discrimination was present, the question is whether it is actionable. I conclude it is not, for the facts here do not tend to show Respondent acted impermissibly in this rather esoteric area of the law. General Counsel cited no authority in warning this issue, and I find the most illuminating expression on the point to be *Group One Broadcasting Co. West*, 222 NLRB 993, 998 (1976), in this case the Board approved a rationale noting:

> . . . the law seems settled that the Act does not give employees the right to use their employer's bulletin board to post notices connected with an effort of a labor organization to organize the employer's employees . . . . But, an employer who discriminates against the posting of such union notices because of his hostility toward unionization violates the Act.[15]

In applying that principle here, I note the absence of hostility (animus) as discussed in more detail respecting the 8(a)(3) issues below. Also, there is evidence that deceptive format was used in regard to much of the posting as would justify its removal by Respondent.

Another pervasive subject of the case is that of employees being deliberately followed around the store, couched in the doctrine of surveillance (or impression of) by the complaints. Here most of all, the evidence is diluted by a high degree of subjectivity necessarily present in what a person reports. I have no doubt that Bolding and others were or seemed close at hand on many occasions through the December-January period (and in Leingang's case claimedly extending into March) involved. However, the very nature of such a store's operations gives rise to much visible mobility by supervisors, and I must note that while specific instances of close shadowing were credibly perceived by several witnesses, this leaves great amounts of time in which it did not occur. I allude again to Leingang's peevish behavior, and particularly her elusiveness during January as to which Davidson "had to take [Jones'] word" that it was happening. Further, there are strange gaps and inconsistencies involving testimony on this point. Leingang claimed that shortly after the presumably eventful meeting in Fournier's office on December 8 she and fellow union activists were followed into the lounge by Cozad, yet none of the other employees corroborated this perception.[16] The experience of Lamphere on December 8 is colored by Cozad's fundamental entitlement to maintain Respondent's business image on a selling floor, and it is profitable to note that Bundy's sensation of how Bolding watched her through the sorting of 5,000 shirts gives rise to the question of why he would make such unproductive use of his time if harboring a consuming interest to primarily and constantly harass Lamphere, Leingang, and Hannan. The obvious conclusion is that insufficient proof of any unfair labor practice conduct included in, or based on, notions of surveillance or harassment has been advanced. See *Mt. Vernon-Woodberry Mills, Inc.*, 64 NLRB 294 (1945). Cf. *Kantor Pepsi-Cola Bottling Co. of Beloit, Wisconsin*, 248 NLRB 99 (1980), where the Board agreed a respondent had not engaged in "surveillance [or] harassment" where two instances of a rank-and-file union activist (although not proven to be known as such by respondent) crossing paths with a member of management constituted "no evidence whatsoever" that the employee had been "systematically watched and harassed."

The most prominent type of what may be termed alleged psychological warfare by Respondent related to Leingang's changed duties after early December. After some ambivalence by General Counsel as to how this

[15] Cf. *Teamsters Local 515 (Roadway Express, Inc.)*, 248 NLRB 83 (1980). This case, decided under Sec. 8(b)(1)(A) of the Act, drew parallels between this and "employer action and an employer respondent" under Sec. 8(a)(1). It treated whether basic Sec. 7 rights were infringed upon, holding they were *not* where "ready access to other, generally effective, means of distribution" was present, "discipline or threat[s] were not directed at the person engaged in posting, and removal was not accompanied by any unwelcome communication to the activist."

[16] I am not certain whether General Counsel is litigating the "funny look on [Jones'] face" as she stood within the ladies' restroom at a time when Leingang was also there. If so, I do not join in the exercise and decline to give this significance or to evaluate free-floating instances of when females chose to enter the store's restroom. Cf. *Sarkes Tarzian, Inc.*, 169 NLRB 587 (1968).

was disadvantageous, it finally settled on "routine" as the appalling punishment. At the threshold this is of doubtful validity as a matter of law. The Board recently dealt with undesirable assignments in a nonmanufacturing setting in *Great Atlantic and Pacific Tea Company, Incorporated*, 244 NLRB 1097 (1979), labeling the area as one of evaluating allegedly "onerous" assignment and finding in that case that the offending employer's demands with respect to an employee whose primary duty was running a checkout stand were to "work her harder" in ways involving the "most difficult part" of truck unloading. It is difficult to equate such an illustration with Leingang's situation, for there is no showing that any significant aggravation arose from the withdrawal of payroll work (an arguably justified action by Respondent in the first instance) or that miscellaneous bookkeeping tasks formerly performed on cost-to-sell and month-end reports and any vested or intrinsic worth.[17] The search for noteworthy differences in elementary tasks associated to ledger work, payroll work, mail work, and miscellaneous bookkeeping chores is futile. Furthermore, Leingang was slotted into advertising work as a week's replacement fill-in, and had "batch" invoice work partly returned at her insistence. This allegation is fuzzy at best, and the evidence concerning it does little to show any discernible form of job discrimination.[18] I conclude no violation has been shown in this regard.

The two written notices issued to Leingang speak for themselves as to content. Again, it is a matter of whether or not to infer unlawfulness in their use. As to the January reprimand, facts show that Leingang flirted with danger by her reckless approach to the pending absence, and particularly the rather lame attempt to foist her own obligations across to Davidson who admittedly could not "grant" the time away.[19] Leingang here again displayed her bent toward distortion and hyperbole by saying that the ultimate contact with Jones about a half hour before she desired to leave was merely an "extra precaution," which seemed helpful "to save my job."[20] Since Leingang knew that Davidson (newly in her own job at the time) was no person to responsibly authorize absence, it is specious to cast the contact with Jones as a sort of afterthought. While the notion that some jeopardy to her job existed at the time is utter fantasy, showing further her limited perception of reality and the necessity of orderliness in a business enterprise. With this, I reject the allegation that Respondent violated the Act by the first issuance. The written notice given her in February is not on its face typical reprimand, and for this reason is discountable at the outset. The testimony of what other employees wore (or did not wear) on their feet over many prior months merits some right, but without a showing that Respondent cavalierly tolerated flaunting of its formal footwear policy the weight to be so given is quite limited. Furthermore, the "laundry list" of untoward footgear is itself suspect. Davidson was not aware of any slippers worn, and while Leingang attributed bare feet on one occasion to Hannan this person inexplicably did not describe such in her own detailed rendition of the oddities walking about. Overall I find this action by Respondent was not a violation as alleged; noting too that Leingang utterly and implausibly characterized its issuance as under a threat of being fired regardless of a doctor's certificate although the document itself expressly provides otherwise. I also credit Bolding's denial on this point.

This conclusion leads inextricably to the matter of Leingang's termination. Here there is simply no basis to treat her choice as other than voluntary. Peripheral items may be noted, such as her interest in other employment manifesting as early as January, and what must be considered a stalled, if not stale, organizing effort in which her involvement would have seemed disappointing to a person of ordinary and prudent sensibilities. I have rejected the fabrication that Bolding conveniently admitted his culpability and have found insufficient evidence to show that any form of unlawful harassment was present against her personally,[21] or otherwise permeated this work atmosphere. On these grounds I decline to conclude that Respondent "constructively" discharged Leingang,[22] and term her leaving as done merely by personal

[17] It is actually inconsistent for General Counsel to press this entire subject, for it conflicts with a theme about how Respondent was really trying to so tie up Leingang that she would be chilled from or restrained as to, her right to engage in protected concerted activities, or Respondent to deliberately accord her up to hours a day of leisure time is inimicable with General Counsel's other contentions.

[18] The most compelling proof on the point is the concise, orderly stipulation as to particular posting work done by Leingang at material times. From this it is seen that she posted to the expense register only on August 8, September 12, and then again on January 9; while her posting to the invoice register was limited to the dates September 12, December 29, and March 6. Even greater significance attaches to the stipulation respecting "batch" invoice work for here, taking the period October 13 to January 31, the most concentrated posting occurred during December 18-29, inclusive, the very heart of the period in which Respondent was alleged to be discriminating by malicious withholding of such duties. In *Michigan Precision Industries, Inc.*, 223 NLRB 892 (1976), the circumstances of an adverse change in hours of work were found not to be violative even with evidence that a foreman had told the affected employee how a higher management official harbored a "bitter taste" carrying over from earlier NLRB proceedings in which the person was involved.

[19] Bundy affirmed that respecting absences from work the personnel manager is "who you were supposed to report to."

[20] The second of these noted characterizations is but another instance of the shrill, baseless innuendo that is cast about in much of the testimony by General Counsel's witnesses. I am convinced that such rhetoric cross-pollinated among the group, and for this reason merits great skepticism. A forceful example of this is testimony of Leingang that Bundy tremulously signed an authorization card in January in a state of fear about "los[ing] her job," yet only scant days later Bundy abruptly decided to resign from this employment of a substantial 6 months' duration because of passing dismay with her otherwise unable supervisor.

[21] A subtle point to note is that Leingang herself, described how Bolding had indirectly encouraged her to remain in employment by lamenting whether her potential departure as suggested by a prospective employer's reference call would leave it "high and dry during [January] inventory."

[22] In *Crystal Princeton Refining Company*, 222 NLRB 1068 (1976), the Board set forth "two elements" which must be proven to establish a constructive discharge. First the burdens imposed on an employee must cause (and be so intended) a change in working conditions "so difficult or unpleasant as to force him to resign," and also that such imposition must have been "because of the employee's union activities." The Board used these tests to view the record "on balance" and that he was motivated by any union activities as may have occurred, or that the new duties were even "difficult or unpleasant." In later applying this doctrine, the dismissal of constructive discharge allegations was affirmed where the job involved was not "so onerous as to force him to leave." *Dillingham, Marine and Manufacturing Co., Fabri-Value Division*, 239 NLRB 908 (1978). In *East Bay Properties, d/b/a Sheraton Inn Airport*, 232 NLRB 670

Continued

choice of one poorly equipped to separate act from fantasy.[23]

Different considerations relate to the 8(a)(3) issue naming Bundy. In her case there is no indication of obstreperousness, and the allegation must be treated squarely from the standpoint of known facts. General Counsel's principal leverage comes from comparing Bundy's treatment to that of Jaeger. This contrast must be given fair weight however, and on balance there is insufficient evidence to justify the inference of discrimination. Inferring a certain conclusion is an intellectual and judgmental function which must take all circumstances into account. In that sense there were two other instances of denied notice (to quit) revocation, and although the comparison is strained this becomes a factor. More importantly, Jaeger's fast-breaking episode does not leave a sense of doubt as to the random manner in which Bolding chose to retain him, reflective of nothing more than a routine daily decision. This, and the fact that there was no rebuttal to Bolding's claim of sorely needing experienced stockroom help, allows the two instances to defy meaningful comparison, particularly where a long span of time separate the two events. The greatest significance is the testimony of Bundy herself that Wesner "did not want to lose . . . . the best worker she had," a remark totally at odds with the claim Respondent had cleverly maneuvered to rid itself of union sympathizers.[24] In resolving Bundy's case it is well to treat other factors of the evidence because they add another dimension to what must be pondered. There is essentially a lack of evidence that Respondent displayed animus toward union activities as manifesting among employees here. While taking various steps to counteract the phenomenon, it never carried out any classic form of interrogation, promises, or threats as might justify the thought that definite violation of law had resulted. On the contrary on one occasion, Bolding assured employees that their involvement would not jeopardize employment. I recognize that such self-serving statements are of limited weight. If on the other hand there is no affirmative showing of doctrinal hostility, or these reasons do not find that Bundy's termination was a constructive discharge. Cf. *Superx Drugs, supra* at 918.

I have included many comments in this Decision about the failings or fantasies of the various employees involved. In doing so it does not diminish the principle that Respondent and only it is here on trial. However, in that same sense a required burden of proof has not been met by General Counsel as to specific allegations on their merits or as they might interrelate to the entire case. When the laboriously presented hypersensitivities, snideness, petty bickering, and tracings of paranoia are swept away, the residue looms no larger than routine interpersonal dealings, sometimes abrasive, sometimes sympathetic, sometimes disappointing, but in no event susceptible of being dignified as a violation of Federal law. While it is often said that the whole is greater than the sum of its parts; the hole may also *merely* be the sum of its parts, and here even the parts have holes.

[Recommended Order for dismissal omitted from publication.]

(1977), cited by General Counsel, the Board adopted a finding of constructive discharge where "onerous working conditions [were] imposed" and the employer's vindictiveness was amply shown. *418 Geary, Inc., d/b/a Stage Deli and Theatre Lounge*, 238 NLRB 276 (1978), is similarly distinguishable on its facts.

[23] As with the notion of "union activities," the term "pressure" became a matter of high suggestibility. Davidson testified in uncontradicted fashion that Brownsworth had requested her to "pressure" Leingang into quitting. This ostensibly sinister remark was not, however, given any particular meaning, and at the time of utterance Leingang had given Respondent little reason to consider her an esteemed or productive employee. Thus, there is ambiguity to the word standing alone, and I am not persuaded to resolve that ambiguity against Respondent. It may also well be noted that Davidson simply disregarded the remark and herself, although not a card signer, consistently felt a lot of pressure "as a vague feeling" around the store. Bundy picked up this cue in her own testimony about the work environment generating "pressure from someplace"; related to this is testimony that Jones told Davidson that Leingang had been instrumental in union activities, a remark I deem under all the circumstances to be nothing more than a statement of fact.

[24] While Wesner is not shown to have been present in secret councils of management, she is a recognized supervisor and would have been just as likely as Davidson to be told that "pressure" against union adherents was desired.